Supreme Court, U. S.
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79-761

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

Ninth Circuit Court of Appeals Case,
Civil No. 79-4230

JAMES B. PACKARD, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit

JAMES B. PACKARD
715 Tennessee Street
Vallejo, California 94590
Telephone: (707) 644-8221
Petitioner In Propria Persona

Dated: November 15, 1979

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7852

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JAMES B. PACKARD, *Petitioner*

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit

Petitioner, In Propria Persona and Plaintiff-Appellant in the lower court, prays that a Writ of Certiorari issue to the Ninth Circuit Court of Appeals to review the Orders denying Motion for Summary Reversal, granting Motion for Summary Affirmance, denying Motion for Entry of Default Judgment, and denying Petition for Rehearing dated August 29, 1979. App. A.

JURISDICTION ON WRIT OF CERTIORARI

U.S.C.A., Title 28-1254 (1) Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

U.S.C.A., Title 28-2101 (c) Application for Writ of Certiorari within 90 days after decree denying Petition for Rehearing.

Rule 15 Plenary Consideration

Ninth Circuit Court of Appeals has affirmed the Eastern District of California Court's Dismissal of this case based on District Court's interpretation of the contract clause of the U. S. Constitution, Art. I(10)(1) to mean "by its very terms applies only to the states and not to the federal government" for this case. App. I.

Above cited interpretation conflicts with the following interpretations cited:

United States Trust Co. v. The State of New Jersey, 431 U.S. 1, 52 L.Ed.2d 92, 109 (1977) says the contract clause, Art. I(10)(1) proscribes any impairment.

Jackson Saw Mill v. United States, 580 F.2d 302, 311 (1978) says contract clause prohibits the action of a law either state or federal that impairs a contract.

Northwestern Nat. Life Ins. Co. v. Jordan, 447 F. Supp. 856, 860 (Nevada) "In order to have constitutionally protected impairment law must act on the contract itself."

Allied Structural Steel v. Spannus, 52 L.Ed.2d 727, 738, contract clause prohibits action of a law impairing the obligation of contract.

Charles River Bridge v. Warren Bridge, et al., 9 L.Ed. 772, 837. "To impair the obligation of a contract the state law must act on the contract."

Malone v. White Motor, 55 L.Ed.2d 443, 457. "It remains for the District Court to consider on remand the contention that the Minnesota Pension Act impairs contractual obligation . . . in violation of the U. S. Constitution."

17 CJS, *Contracts,* at Page 542, Note 37.5 says, "Obligation of a contract is found in the terms in which that contract is expressed."

Ninth Circuit Court of Appeals has no precedent case concerning the interpretation of the contract clause of the United States Constitution that this petitioner can find.

Departure From the Accepted and Usual Course of Judicial Proceedings

Ninth Circuit Court of Appeals decisions this case are administrative decisions, not judicial decisions.

If the United States of America, Treasury Department can impair the obligation of petitioner's contracts, the State of California, Dept. of Benefit Payments and Dept. of Industrial Relations can do likewise. *Packard v. State of California,* 9th Cir. Case No. 79-4138, Dismissal pending.

If the State of California and the United States can impair the obligation of petitioner's contracts the City of Vallejo can do likewise. Citing:

Packard v. Welch, et al., U.S. S.Ct. 74-1135 (1975);
Packard v. Welch, et al., US. S.Ct. 75-1837 (1977);
City of Vallejo v. Packard, U.S. S.Ct. 78-1473 (1979).

Certiorari Denied, all three cases.

QUESTIONS FOR REVIEW

Is the contract clause of the U.S. Constitution, Art. I(10)(1) interpreted to mean that it applies only to the states and not to the federal government?

Is Petitioner entitled to a default judgment against the United States of America?

CONSTITUTIONAL PROVISIONS, RULES AND SUMMONS

U. S. Const. Art. I(10)(1), "No State shall pass any law impairing the obligation of contracts."

Summons issued by Eastern District Court of California.

> "To the above named defendant:
> You are hereby summoned and required to serve upon James B. Packard, whose address is 715 Tennessee St., Vallejo, California 94590, an answer to the complaint which is herewith served upon you within 60 days after service upon you, excluding the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint."

F.R.C.P. Rule 7 (b) (1) (Titled) Motions and Other Papers.

> "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

F.R.C.P. Rule 55 (a) (Titled) Default

> "Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and the fact is made to appear by affidavit or otherwise, the clerk shall enter his default."

STATEMENT OF CASE

On August 26, 1977 appellant received from the United States Department of the Treasury a rejection of his claim for 192,000 dollars and permission to file suit in an appropriate United States District Court within six months of mailing of the notification, citing 28 U.S.C. 2401 (b).

On September 7, 1977 United States Attorney was served with Summons and Complaint by U.S. Marshal.

On November 9, 1977 petitioner received a response by mail from Barry Lieberman, Trial Attorney, Tax Division, Department of Justice, Washington, D.C. The response had a certified mailing date of November 7, 1977. The response was a non-noticed Motion to Dismiss attached to a Memorandum of Law.

On November 21, 1977 petitioner filed a Notice and Motion for Entry of Default Judgment with a certified mailing date of November 17, 1977.

On November 21, 1977 United States Attorney, Dwayne Keyes filed a Notice of Hearing on the non-noticed Motion To Dismiss.

On December 28, 1977 District Court filed an Order denying petitioner's Motion for Default Judgment, finding that

the Motion to Dismiss was timely served in accordance with Federal Rules of Civil Procedure. App. J.

On January 10, 1978 District Court filed a Memorandum and Order granting respondent's Motion To Dismiss on basis of F.R.C.P. Rule 12(b)(6), and further stating that "the Contract clause of the United States Constitution, Art. I(10(1) by its very terms applies only to the States, and not to the federal government." App. I.

On January 27, 1978 petitioner filed a Notice and Motion to Amend Findings.

On March 2, 1978 District Court filed its Memorandum and Order denying the Motion to Amend Findings and further stating that "Plaintiff's Complaint filed September 7, 1977 simply does not state a claim upon which relief can be granted." App. H.

On November 6, 1978 petitioner received a Notice from District Court that this case had been placed on the Court's calendar for a December 18, 1978 Hearing for dismissal for lack of prosecution. App. G.

On December 21, 1978 District Court filed its Memorandum and Order dismissing petitioner's Complaint with prejudice for failure to prosecute pursuant to F.R.C.P. Rule 41 (b). App. E.

On December 18, 1978 Judgment of Dismissal was filed by the Clerk. App. F.

On December 28, 1977 District Court filed an Order denyfrom the Judgment entered December 18, 1978. App. D.

On May 3, 1979 petitioner submitted to Ninth Circuit Court of Appeals a Motion for Summary Reversal.

On May 13, 1979 Petitioner received from respondent a Motion for Summary Affirmance and Objection to Motion for Summary Reversal, prepared by M. Carr Ferguson, Assistant Attorney General, Tax Div., Department of Justice, Washington, D.C.

On May 18, 1979 petitioner submitted an objection to Motion for Summary Affirmance.

On May 21, 1979 Court of Appeals filed Order denying petitioner's Motion for Summary Reversal. No opinion or reasons stated. App. C.

On June 6, 1979 petitioner submitted Motion for Order Directing District Court to enter Default Judgment.

On July 26, 1979 Court of Appeals filed Order denying Motion for Order directing default, granting respondent's Motion for Summary Affirmance and affirmed District Court's Dismissal. No opinion or reasons stated. App. B.

On August 29, 1979 Court of Appeals filed Order denying petitioner's Petition for Rehearing. No opinion or reasons stated. App. A.

ARGUMENT

District Court's Dismissal of this action is based on its interpretation of the contract clause of the United States Constitution to mean "by its very terms only applies to the States and not to the Federal Government." This interpretation has been refuted by the following cases:

U.S. Trust Co. v. The State of New Jersey, Supra;
Jackson Saw Mill v. U. S., Supra;

Northwestern Life Ins. v. Jordan, Supra;
Allied Structural Steel v. Spannus, Supra;
Malone v. White Motor, Supra.

The proper interpretation of the contract clause of the U. S. Const. as shown by above cited cases is the contract clause prohibits the action of any law impairing the obligation of contracts. A law must act on a contract causing impairment is what the contract clause prohibits.

Petitioner's two cases *New Jersey v. Yard,* 24 L.Ed. 352 and *Piqua Branch of the State Bank of Ohio v. Knoop,* 14 L.Ed. 977 show the action of state laws regulating a change of rates on contracts which this Supreme Court would not allow, because of the contract clause prohibition.

District Court's reliance for authority for its interpretation on *Century Arms v. Kennedy,* 323 F.Supp. 1002, 1014, *aff'd* 449 F.2d 1306, *cert. denied,* 92 S.Ct. 1494 is not supported by this Supreme Court because the interpretation was not affirmed.

District Court's further reliance on *California Teacher's Assn. v. Newport Mesa Unified Sch. Dist.,* 333 F.Supp. 436, 443 shows a misunderstanding of the case. The teachers were pleading the interpretation of the California State Constitution contract clause as the interpretation of the contract clause of the U. S. Const. The teachers were allowed an opportunity to Amend their Complaint.

District Court's rejection of petitioner's case citation *Lynch v. United States,* 292 U.S. 571, 54 S.Ct. 840 shows misunderstanding of the interpretation of the contract clause. This Supreme Court would not allow the action of a congressional statute to be enforced on the war risk

insurance policy contract because of the prohibition of the contract clause.

District Court's further rejection of petitioner's case citation *United States Trust Co. v. State of New Jersey,* Supra, shows further misunderstanding or just plain defiance of the interpretation of the contract clause by this Supreme Court. In this *U. S. Trust Co.* case this court would not allow the action of New Jersey State repealing statute to be enforced on the contract the United States Trust Co. had embodied in the covenant statute of the State of New Jersey, because of the prohibition of the contract clause.

In this case at bench this petitioner is pleading the action of the printed percentages in the United States Treasury Department's regulation Form 941 over and above one percent are impairing the obligation of this petitioner's contract for employer contribution for employees' social security. Since the year 1950 petitioner has been submitting quarterly contributions in excess of one quarter as demanded by the Form 941 printed percentages.

This petitioner also believes he is entitled to a default judgment against the United States for failure to comply with the mandate of the Summons issued by District Court to respond to the Complaint by serving a response *upon* this petitioner within 60 days. The F.R.C.P. Rule 5(b) provision that Service by mail is complete on the mailing does not mean that petitioner had the response served upon him within 60 days.

Further, the response was not in the proper form in accordance with F.R.C.P. Rule 7(b)(1). No Notice of

Hearing on the Motion to Dismiss was served as is required. District Court abused its discretion by allowing the Notice of Hearing to be filed by the United States Attorney on November 21, 1979, and further holding a hearing on the Motion to Dismiss.

WHEREFORE THIS PETITIONER PRAYS certiorari be granted in order that this case be remanded to District Court for entry of a Default Judgment by the Clerk, App. K; or the alternative that the United States of America Answer the Complaint in accordance with F.R.C.P. Rule 7(a) and F.R.C.P. Rule 8(b).

Dated October 28, 1979

JAMES B. PACKARD
Petitioner In Propria Persona

(Appendices Follow)

Appendices

APPENDIX A

United States Court of Appeals
For the Ninth Circuit

James B. Packard, Plaintiff/Appellant, vs. United States of America, Defendant/Appellee.	No. 79-4230 D.C. # 77-467 Eastern California (Sacramento) ORDER

[Filed August 29, 1979]

Before: ELY and GOODWIN, Circuit Judges.

Upon due consideration, appellant's petition for rehearing is denied.

APPENDIX B

United States Court of Appeals
For the Ninth Circuit

James B. Packard, Plaintiff/Appellant, vs. United States of America, Defendant/Appellee.	No. 79-4230 D.C. # 77-467 Eastern California (Sacramento) ORDER

[Filed July 26, 1979]

Before: ELY and GOODWIN, Circuit Judges.

Upon due consideration of the parties' motions and opposition and the record on appeal, the Court issues the following order:

(a) appellant's motion for an order directing default is denied; and

(b) appellee's motion for summary affirmance is granted and the district court's dismissal of appellant's action is hereby affirmed.

APPENDIX C

United States Court of Appeals
For the Ninth Circuit

James B. Packard, Plaintiff-Appellant, vs. United States of America, Defendant-Appellee.	No. 79 4230 D.C. # 77-467 E. Calif. (Sacto) ORDER

[Filed May 21, 1979]

Before: CHOY and TANG, Circuit Judges.

Upon due consideration, appellant's motion for summary reversal is denied.

APPENDIX D

James B. Packard
715 Tennessee Street
Vallejo, California 94590
Telephone: (707) 644-8221
In Pro. Per.

In the United States District Court
For the Eastern District of California

James B. Packard, Plaintiff and Appellant, vs. United States of America, Defendant and Appellee.	Case No. Civ. S-77-467-PCW

[Filed February 12, 1979]

NOTICE OF APPEAL

Notice is hereby given that James B. Packard, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 18th day of December 1978.

Dated: February 10, 1979

/s/ James B. Packard
Plaintiff-Appellant
In Propria Persona
715 Tennessee St.
Vallejo, California 94590

APPENDIX E

In the United States District Court
for the Eastern District of California

James B. Packard, Plaintiff, vs. United States of America, Defendant.	Civ. No. S-77-467

[Filed December 21, 1978]

MEMORANDUM AND ORDER

Plaintiff's *pro per* complaint against the United States, alleging deprivation of civil rights and impairment of the obligation of contract, was placed on the Court's calendar of December 18, 1978 for dismissal for lack of prosecution, pursuant to Local Rule 117 of the Local Rules of Practice for the Eastern District of California. For the reasons stated in the following procedural history and memorandum of law, the Court will dismiss this action for lack of prosecution.

Plaintiff's complaint was filed September 7, 1977, alleging primarily that Congressional amendments raising the tax on employers (such as plaintiff) authorized by the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101 *et seq.*, violate the Contracts Clause of the U.S. Constitution (Art.I, § 10, cl.1). Additionally, the complaint alleged that the raising of FICA tax rates constitutes a deprivation of plaintiff's civil rights. (See, Memorandum and Or-

der filed January 10, 1978 by this Court for a more detailed description of plaintiff's action.)

Defendant United States moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, which motion was heard on the Court's January 3, 1978 Law and Motion Calendar. On January 10, 1978, the Court issued its Memorandum and Order dismissing plaintiff's action for failure to state a claim (Rule 12(b)(6)); however, the Court expressly made its dismissal without prejudice, granting plaintiff 30 days leave to file an amended complaint. The designation of the dismissal as without prejudice was noted three times in the Court's January 10 Memorandum and Order, and the 30 days leave to amend was noted twice.

Instead of amending his complaint, plaintiff moved, on January 27, 1978, to amend the Court's findings, pursuant to Federal Rule of Civil Procedure (FRCP) 52(b). This motion was heard on the February 27, 1978 Law and Motion Calendar. By Memorandum and Order of March 2, 1978, the Court again informed plaintiff that his dismissal had been without prejudice, and that FRCP Rule 52(b) was inapplicable to the case at this stage. However, treating the motion as seeking relief from the January 10 Order, since the motion dealt exclusively with the merits of plaintiff's action, the Court reexamined and reaffirmed its prior Order and denied plaintiff's motion.

The file reflects absolutely no action in the case since the March 2, 1978 Memorandum and Order. This period of inactivity being at least six months, the action was placed

on the Court's calendar for dismissal for lack of prosecution, by Notice issued November 6, 1978.

In response to this Notice, plaintiff has submitted an affidavit which for the most part again argues the merits of the case. Rather than amend his complaint to attempt to state a cause of action, plaintiff now argues in effect that the Court's January 10 dismissal was improper, because the Contracts Clause has been violated by Congressional amendments of the FICA tax rate.

Without dealing at any length with the merits of this action, which are largely beyond the scope of the instant issue of *dismissal for lack of prosecution*, the Court will note that plaintiff's newly-cited authorities do not avail him. The case of *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840 (1934), is inapposite in that the Congressional impairment of contract rights therein was struck down on 5th Amendment (taking without just compensation) grounds, not on grounds of the Contracts Clause. *United States Trust Co. of New York v. New Jersey*, 97 S.Ct. 1505 (1977), also cited by plaintiff, is distinguishable in that it involved state laws which were held to have impaired contracts. (Note the Court's language at 97 S.Ct. 1515: "It long has been established that the Contract Clause limits the power *of the States* to modify their own contracts as well as to regulate those between private parties." [Emphasis added].) Suffice it to say that this Court has reexamined the authorities it cited at p.2, l.16-19 of its January 10, 1978 Memorandum and Order, and is still of the opinion that plaintiff's original complaint,

grounded upon the Contracts clause, fails to state a cause of action against defendant United States.

Plaintiff argues that the Court is without discretion to dismiss his case, citing *Cancino v. Sanchez*, 379 F.2d 808 (9th Cir. 1967). That case is wholly inapposite, in that it involves the trial court's having dismissed an action because it was brought by a prisoner. The dismissal now concerning plaintiff's action results from plaintiff's failure to prosecute it diligently, and is well within the Court's discretion, pursuant to Local Rule 117 and FRCP Rule 41(b). *Alexander v. Pacific Maritime Association*, 434 F.2d 281 (9th Cir. 1970), *cert. den.*, 401 U.S. 1009 [9 months without any activity by plaintiffs; dismissal affirmed]. *Alexander* states, at 283, as follows:

> It is well settled in this circuit that a district court has power to dismiss an action for want of prosecution on its own motion, both under Rule 41(b), F.R. Civ.P., and under its local rule, or even in the absence of such rules. [Citations] The exercise of the power to dismiss is discretionary and will be reversed only for an abuse of that discretion.

In the case at bar, it has been over 10 months since the date an amendment to plaintiff's complaint was due, and over 9 months since the last action in the file. The Court's January 10 Order granting 30 days leave to amend was clear; plaintiff's choice to continue to argue the merits rather than amend was made at his own peril. The Court will therefore, at this time, dismiss plaintiff's action *with prejudice*, for failure to prosecute, pursuant to FRCP 41(b).

IT IS ORDERED that plaintiff's action be, and hereby is, dismissed with prejudice for failure to prosecute.

Dated: December 20, 1978.

/s/ PHILIP C. WILKINS
United States District Judge

APPENDIX F

United States District Court
for the
Eastern District of California

James B. Packard, Plaintiff, vs. U. S. of America, Defendant.	Civil Action File No. S-77-467 PCW

[Filed December 18, 1978]

JUDGMENT

This action came on for (hearing) before the Court, Honorable Philip C. Wilkins, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, December 18, 1978.

It is Ordered and Adjudged that plaintiffs action be, and the same is, hereby dismissed with prejudice pursuant to Rule 41(b).

Judgment is hereby entered accordingly.

Dated at Sacramento, California, this 18th day of December, 1978.

JAMES R. GRINDSTAFF
Clerk of Court
By: L. Minor, Deputy Clerk

APPENDIX G

United States District Court
for the
Eastern District of California

Packard, vs. U. S. A.	No. Civ. S-77-467 PCW

NOTICE

To:

James B. Packard
715 Tennessee Street
Vallejo, CA. 94590

Louis J. Bizzarri
Assistant U. S. Attorney
2058 Federal Building
650 Capitol Mall
Sacramento, CA. 95814

Barry Lieberman
Trial Attorney—Tax Division
Department of Justice
Washington, D.C. 20530

You are hereby notified that on November 6, 1978, Judge Philip C. Wilkins Ordered this case placed on the calendar of December 18, 1978 at 10:00 A.M. for Dismissal for Lack of Prosecution pursuant to Local Rule 117.

Counsel are directed to show cause by affidavit or certificate of counsel why the action should or should not be dismissed. All such affidavits or certificates are to be filed at least 14 days prior to the hearing.

Sacramento, California
11-6-78

JAMES R. GRINDSTAFF
Clerk, U. S. District Court
By: L. Minor, Deputy Clerk

APPENDIX H

In the United States District Court
For the Eastern District of California

James B. Packard, Plaintiff, vs. United States of America, Defendant.	Civ. No. S-77-467 PCW

[Filed March 2, 1978]

MEMORANDUM AND ORDER

Plaintiff's *pro per* complaint against the United States, alleging deprivation of civil rights and impairment of the obligation of contract, was dismissed without prejudice by Memorandum and Order of this Court filed January 10, 1978. Plaintiff now makes a "Motion to Amend Findings" pursuant to FRCP 52(b), which motion was heard on the Court's February 27, 1978 Law and Motion calendar.

This Court dismissed plaintiff's complaint for failure to state a claim upon which relief can be granted, pursuant to FRCP 12(b)(6). In so dismissing, the Court issued a Memorandum and Order; it made no findings of fact, nor did it enter judgment since the dismissal was without prejudice. Since FRCP 52(b) concerns amendment of findings after entry of judgment, that rule is inapplicable to this action at this time. As expressly noted in FRCP 52(a), "[f]indings of fact and conclusions of law are unnecessary on decision of motions under Rules 12 or 56 . . . ."

However, the Court will treat plaintiff's instant motion as seeking relief from the Court's January 10 Order, pursuant to FRCP 60(b). Plaintiff has not stated any grounds for relief under the specific subsections of FRCP 60(b). Rather, his sole basis for seeking to amend the January 10 Order appears to be his belief that this Order's legal rationale and conclusion are wrong.

The Court has reexamined its prior Order and the case authority upon which it was based, and concludes that there is no basis in law or fact to now change that Order. Plaintiff's complaint, as filed September 7, 1977, simply does not state a claim upon which relief can be granted.

It Is Therefore Ordered that plaintiff's instant "Motion to Amend Findings" be, and the same hereby is, denied.

Dated: March 1, 1978.

/s/ PHILIP C. WILKINS
United States District Judge

APPENDIX I

In the United States District Court
For the Eastern District of California

James B. Packard, Plaintiff, vs. United States of America, Defendant.	Civ. No. S-77-467 PCW

[Filed January 10, 1978]

MEMORANDUM AND ORDER

Plaintiff's *pro per* complaint against the United States, alleging deprivation of civil rights and impairment of the obligation of contract, was filed September 7, 1977. Defendant United States moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This motion was heard on January 3, 1978. For the reasons stated below, the Court will dismiss plaintiff's complaint, without prejudice, for failure to state a claim upon which relief can be granted (Rule 12(b)(6)).

As owner and operator of a business establishment, plaintiff has been making contributions for his employee under the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101 *et seq.*, since 1949. The tax on employers authorized by FICA has been rising slowly but continuously since its inception, by virtue of amendments to the statute setting tax rates. See 26 U.S.C. § 3111(a).

Plaintiff alleges that the tax rate initially applied to his business in 1949 constituted a "contract" between him and

the Internal Revenue Service, such that the continuing upward amendments of the tax rate by Congress impair his obligation of contract and thus violate the constitutional prohibition against impairment of contracts. U. S. Constitution, Article I, § 10, cl. 1. Plaintiff further alleges that the raising of FICA tax rates constitutes a deprivation of his civil rights, in violation of 42 U.S.C. § 1983; the specific constitutional right underlying plaintiff's § 1983 claim is again the Contracts Clause (Art. I, § 10, cl. 1).

Article I, § 10, cl. 1 provides, in relevant part, that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . ." This clause of the Constitution, by its very terms, applies only to the States, and not to the federal government. *Century Arms, Inc. v. Kennedy,* 323 F.Supp. 1002, 1014 (D. Vt. 1971), *aff'd.* 449 F.2d 1306, *cert. denied* 92 S.Ct. 1494; see also, *California Teach. Ass'n v. Newport Mesa Unified Sch. Dist.,* 333 F.Supp. 436, 443 (C.D. Cal. 1971).

The authority cited by plaintiff, *New Jersey v. Yard,* 95 U.S. 104, 24 L.Ed. 352 (1877), and *The Piqua Branch of the State Bank of Ohio v. Knoop,* 57 U.S. 369, 14 L.Ed. 977 (1853), are inapposite: in those cases, *state* laws impairing contractual obligations were struck down.

Since the legislative changes made in the FICA tax rate were Congressional enactments, rather than state law, the Contracts Clause is inapplicable to the instant case.

Plaintiff's civil rights cause of action, 42 U.S.C. § 1983, is based upon a deprivation of his right secured by the Contracts Clause. As there is no violation of that constitu-

tional clause herein, the § 1983 cause of action on that basis must fail as well. Moreover, § 1983 applies only to persons acting under color of *State* law, and is inapplicable to actions of federal officials under color of federal law. See *Williams v. Wright,* 432 F.Supp. 732, 737 (D. Ore. 1976); *Williams v. Rogers,* 449 F.2d 513, 517 (8th Cir. 1971), and cases cited therein.

The individual here alleged to have violated plaintiff's rights is a federal official (Mr. Fred Perdue, Director of the Fresno Branch of the Internal Revenue Service); plaintiff can state no § 1983 cause of action as to him.

Plaintiff's reliance on *Bivens v. Six Unknown Agents of Fed. Bur. of Narc.,* 91 S.Ct. 1999 (1971), is misplaced. *Bivens* implied a remedy to protect *Fourth Amendment* rights against invasion by federal agents. The instant case does not involve the Fourth Amendment, but rather the Contracts Clause, and is thus distinguishable; moreover, plaintiff cannot state a cause of action for any invasion of his Contract Clause rights by the federal defendant here.

Accordingly, the Court concludes that the above entitled action must be dismissed, without prejudice; however, the Court will grant plaintiff an additional 30 days in which to file an amended complaint, should he wish to, *and if he is able to state a federally cognizable cause of action.*

It should also be noted in conclusion that the constitutionality of the Federal Insurance Contributions Act has been challenged before, and been upheld by the Supreme Court, in *Helvering v. Davis,* 57 S.Ct. 904 (1937).

It is therefore ordered that plaintiff's complaint be, and the same is, hereby dismissed, without prejudice.

It is further ordered that plaintiff shall have 30 days in which to file an amended complaint.

Dated: January 9, 1978.

/s/ PHILIP C. WILKINS
United States District Judge

APPENDIX J

Louis J. Bizzarri
Assistant U.S. Attorney
2058 Federal Building
650 Capitol Mall
Sacramento, California 95814
Telephone: (916) 440-2660
Attorneys for Defendant

In the United States District Court
for the Eastern District of California

James B. Packard, Plaintiff, vs. United States of America, Defendant.	Civ. No. S-77-467 PCW

[Filed December 28, 1977]

FOR DEFAULT JUDGMENT
ORDER DENYING PLAINTIFF'S MOTION

Plaintiff's Motion for Entry of Default Judgment came on regularly to be heard on December 19, 1977, before the Honorable Philip C. Wilkins, United States District Judge. Defendant appeared by and through its counsel Louis J. Bizzarri, Assistant U.S. Attorney. Plaintiff appeared *in propria persona,* the matter having been argued to the Court and the Court being fully appraised in the premises, and good cause appearing, therefore,

The Court now finds, for the purposes of this Order, that defendant's Motion to Dismiss was timely served in accordance with the Federal Rules of Civil Procedure;

And the Court further finds that plaintiff is not entitled to a default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure.

It is, therefore, ordered that plaintiff's Motion for Entry of Default Judgment be, and the same is, denied.

Dated: December 28, 1977

PHILIP C. WILKINS
United States District Judge

APPENDIX K

United States District Court
Eastern District of California
Office of the Clerk
Sacramento 95814
November 10, 1977

James R. Grindstaff
Clerk
James B. Packard
715 Tennessee Street
Vallejo, Ca. 94590

In Re: Civ. S-77-467 PCW Packard v. U. S. A.

Dear Mr. Packard:

Pursuant to our telephone conversation this morning regarding the entry of default by the Clerk, this is to inform you that this would be a proper procedure, except that in this case the defendants responded to your summons in the required time, according to their Certificate of Service of mailing.

If you wish to Notice this matter for hearing, you may do so pursuant to Local Rule 113.

Very truly yours,

JAMES R. GRINDSTAFF,
Clerk

By: L. Minor, Deputy Clerk

SUPREME COURT, U.S.
FILED
JAN 16 1980
MICHAEL RODAK, JR., CLERK

No. 79-761

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES B. PACKARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-761

JAMES B. PACKARD, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the dismissal of his action against the United States for damages for injuries claimed to have been suffered from the government's impairment of an alleged contract between him and the Internal Revenue Service.

The pertinent facts may be summarized as follows: On September 7, 1977, petitioner commenced this action in the United States District Court for the Eastern District of California, seeking $192,000 in damages as a result of the government's asserted impairment of an alleged contract between himself and the Internal Revenue Service (R. 6).[1] Petitioner claimed that the Employer's

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[1] "R." refers to the duplicated record filed in the court of appeals.

Quarterly Federal Tax Return (Form 941) that he filed in 1949, constituted a contract with the Internal Revenue Service which placed a ceiling upon the amount of Federal Insurance Contribution Act (FICA) taxes the government could collect from him, and that subsequent increases in the FICA tax rate impaired the obligation of that contract in violation of the Contract Clause (Article I, Section 10, Clause 1) of the Constitution (R. 3-6). Petitioner also contended that the increases in the FICA tax rate infringed his civil rights in violation of 42 U.S.C. 1983, and were an actionable tort under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (see R. 1-2).

The district court dismissed the complaint for failure to state a cause of action upon which relief could be granted. The court, however, specifically provided that the dismissal was without prejudice and granted petitioner 30 days within which to file an amended complaint (Pet. App. 1-3). Petitioner did not amend the complaint, but instead filed a "Motion to Amend Findings" (R. 64-69) pursuant to Fed. R. Civ. P. 52(b). In denying petitioner's motion, the district court pointed out that Rule 52(b) was inapplicable because it had made no findings. See Fed. R. Civ. P. 52(a). Petitioner took no further action. As a result, on December 18, 1978, the court dismissed the action with prejudice for lack of diligent prosecution (Pet. Apps. E, F, and G). See Fed. R. Civ. P. 41(b). The court of appeals affirmed (Pet. App. B).

1. The courts below correctly dismissed the complaint for failure to state a cause of action. The Employer's Quarterly Federal Tax Return is merely a reporting form and contains no language which could possibly be construed as an agreement never to alter FICA tax rates. Indeed, even if the filing of the return could possibly be

viewed as a contractual agreement, no action based on an impairment of contractual obligation will lie against the United States. See *N.B. & C. Lines* v. *Director, Office of W.C.P.*, 539 F. 2d 378, 381 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977); *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith*, 567 F. 2d 1174, 1179 (2d Cir. 1977); *Jackson Sawmill Co.* v. *United States*, 428 F. Supp. 555, 560 (E.D. Mo. 1977), aff'd, 580 F. 2d 302 (8th Cir. 1978); *Century Arms, Inc.* v. *Kennedy*, 323 F. Supp. 1002 (D. Vt.), aff'd, 449 F. 2d 1306 (2d Cir. 1971), cert. denied, 405 U.S. 1065 (1972). Nor does the increase in the FICA tax rates violate petitioner's rights to due process. See *Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947).

2. At all events, assuming petitioner might have amended his complaint to allege facts stating a cause of action, the district court properly dismissed the complaint for lack of diligent prosecution. Such a decision is within the discretion of the trial court. See *e.g.*, *Anderson* v. *Air West, Inc.*, 542 F. 2d 522 (9th Cir. 1976); *Marshall* v. *Seilaff*, 492 F. 2d 917 (3d Cir. 1974). Here, the record shows that the district court acted well within the bounds of that discretion. In its first order, the court stated its reasons for dismissal and gave petitioner 30 days within which to amend his complaint. Petitioner chose, however, not to amend his complaint but instead merely repeated the same arguments made in the original complaint, in a misconceived motion under Rule 52(b). Moreover, after denial of his motion, petitioner did nothing for nine months and offered no explanation for his failure to pursue his case during that period. In these circumstances, the trial court was amply justified in dismissing the action for failure to prosecute.

3. Petitioner further argues (Pet. 9) that he was entitled to a default judgment on the ground that the government failed to file a proper response to his complaint. But as the district court found (Pet. App. 1), the government's motion to dismiss was timely filed under Fed. R. Civ. P. 5(b), 6(a), and 12(a). Moreover, contrary to petitioner's contention, neither the Federal Rules nor the district court's local rules require that a written notice of the hearing of a motion accompany each motion at the time of service. Rather, under the local rules, the only requirement is that such a notice be filed at least 28 days prior to a hearing on the motion. Here, the government served its notice of motion on November 21, 1977, and the hearing was set for January 3, 1978 (R. 31; Docket Entries). It therefore complied fully with the requirement of the local rules.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1980

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[2]At all events, even on the assumption that the government filed its motion to dismiss out of time, entry of a default judgment against the government would have been improper because petitioner failed to establish that he was entitled to relief. See Fed. R. Civ. P. 55(e); *Poe* v. *Mathews*, 572 F. 2d 137 (6th Cir. 1978); *Mason* v. *Lister*, 562 F. 2d 343, 345 (5th Cir. 1977).